BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GARY DEAN HASKELL	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,040,787
JORY'S PRIDE RESTAURANT	)	
Respondent	)	
AND	)	
	)	
FARMERS INSURANCE EXCHANGE	)	
Insurance Carrier	)	

ORDER

Respondent appeals the November 4, 2008 Order For Medical Treatment of Administrative Law Judge Pamela J. Fuller (ALJ). Claimant was awarded medical treatment as recommended by board certified neurological surgeon Paul S. Stein, M.D., unauthorized medical payments for the bill from Dr. Stein and authorized medical treatment payments for the treatment of United Radiology Group after the ALJ determined that claimant's preexisting condition was aggravated by his work-related accidental injury.

Claimant appeared by his attorney, Scott J. Mann of Hutchinson, Kansas. Respondent and its insurance carrier appeared by their attorney, Clifford K. Stubbs of Roeland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held November 3, 2008, with attachments; and the documents filed of record in this matter.

ISSUES

1. In respondent's "Application for Review", filed with the Workers Compensation Division (Division), the only issue listed is "compensability". The dispute detailed in respondent's "Appellant's

Brief To The Board Of Appeals" involves a dispute centering around whether claimant's need for ongoing medical treatment stems from an injury suffered on January 3, 2008, or whether claimant's need for treatment is due to preexisting problems associated with significant low back difficulties.

2. Respondent, in its Brief to the Board, also argues that claimant's injury arose while claimant was walking home. Respondent thus raises the "going and coming" defense from K.S.A. 2007 Supp. 44-508(f). However, this issue was not raised at the preliminary hearing before the ALJ, nor was it raised in respondent's "Preliminary Hearing Brief Of Respondent", filed with the Division on August 7, 2008.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Order For Medical Treatment should be affirmed.

Claimant has owned and operated a restaurant known as Jory's Pride Restaurant in Kinsley, Kansas, for 23 years. Claimant does all the cooking and manages the operation of the restaurant. Claimant employs both full- and part-time help and provides workers compensation insurance for those employees. Claimant had provided workers compensation insurance for himself in the past, but it had become too expensive, and several years ago, claimant dropped the insurance on himself. However, in the fall of 2007, claimant was contacted by his insurance agent, Ginger Brewer of Dodge City, Kansas, about coverage on himself. She expressed concern that claimant could get hurt, considering the amount of time he traveled for his job. Claimant considered her suggestion and sent an e-mail to her on November 19, 2007, discussing the insurance. Claimant then agreed to add himself to the policy, effective January 1, 2008. On January 3, 2008, while taking inventory in an outside freezer, claimant slipped on ice and jarred his back. Claimant did not feel immediate pain, but shortly thereafter, while walking from the freezer to his home, claimant began experiencing severe pain in his back and down his right leg.

Claimant has a history of back and right leg problems. He has been receiving chiropractic treatment with Randy Schmidt, D.C., for years. On August 27, 2007, he reported to Dr. Schmidt that he was suffering from low back and right leg pain. Claimant reported that the pain began in his right knee and radiated into his low back. Claimant did not report any accident associated with these back and leg problems. An MRI performed

on September 5, 2007, displayed moderate disc bulging at L3-4 and L5-S1 with multiple levels of spinal stenosis.

Claimant referred himself to his family doctor, Allen Hooper, M.D., and was subsequently referred by Dr. Hooper to neurological surgeon Matthew N. Henry, M.D. Dr. Henry examined claimant on September 25, 2007, at which time he also reviewed the MRI. He diagnosed claimant with degenerative disc disease with moderate spinal stenosis at L3-4 and L4-5. Surgery was not recommended as claimant's worst pain was reported in the right knee. Claimant was referred for orthopedic evaluation and possible injections in the right knee.

Claimant admitted to having ongoing difficulties with his low back. Claimant, at times, suffered with severe pain and was unable to walk or stand without the aid of crutches. Dr. Henry indicated in his report that claimant's primary problems were in the knee. Claimant did not agree with this assessment and sought treatment with a physician with whom he had past experience and with whom he felt comfortable. Orthopedic surgeon Leonard Fleske, M.D., had treated claimant for right knee problems in the late 1980s and continued treatment postoperatively through 1992. He also treated claimant for right shoulder difficulties in 1995 and 1996. Claimant returned to Dr. Fleske on October 5, 2007, reporting constant pain in his low back and right leg. Dr. Fleske referred claimant for epidural injections into his low back, with the first being on November 6, 2007, the second on November 20, 2007, and the last on December 18, 2007. Claimant testified that he felt almost immediate relief with the first injection. His symptoms improved to the point that on December 28, 2007, when next examined by Dr. Schmidt, claimant reported only a little bit of low back pain and his knee was better. When Dr. Schmidt next examined claimant on January 4, 2008, claimant was reporting having slipped on ice the day before and "jarred himself". Claimant was experiencing severe right leg pain and low back pain. Dr. Schmidt diagnosed a possible herniated disc. Dr. Schmidt's treatment would provide claimant with only temporary relief.

Claimant came under the care of board certified neurological surgeon Ali B. Manguoglu, M.D., with Dr. Manguoglu first examining claimant on May 6, 2008. At that time, he was advised of the incident on January 3, 2008, when claimant slipped on ice. Claimant underwent a second MRI on May 27, 2008, at Dr. Manguoglu's direction. Claimant was diagnosed with extreme lateral foraminal herniation at L3-4 on the right and lumbar spinal stenosis at L3-4 and L4-5. In his letter of May 19, 2008, to Rick Garrison, Farmer's Insurance representative, Dr. Manguoglu reported that claimant most likely had a herniated disc at L3-4 on the right with the incident of January 3, 2008, being only a temporary aggravation of claimant's preexisting condition.

Claimant was referred by his attorney to board certified neurological surgeon Paul S. Stein, M.D., for an examination on August 29, 2008. The history provided to Dr. Stein was as provided to Dr. Manguoglu and Dr. Schmidt. Dr. Stein also reviewed the MRI scans

from both September 5, 2007, and May 27, 2008. In his report, Dr. Stein noted that he had the opportunity to compare the images as well as the reports. He noted that the scans were essentially the same. Dr. Stein also reviewed medical reports from Dr. Fleske, Dr. Hooper, Dr. Schmidt, Dr. Henry and Dr. Manguoglu, as well as MRI and EMG/NCT tests of claimant's lower extremities. He diagnosed a possible disk protrusion at L3-4 and noted the claimant's reported improvement after he received the epidural injections in November and December 2007. Dr. Stein opined that claimant had suffered an aggravation of his underlying pathology at the time of the January 3, 2008, accident and noted a causal relationship between claimant's current symptomatology and the incident on January 3, 2008. Both Dr. Stein and Dr. Manguoglu recommended that claimant undergo surgery for his low back pain.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

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[1] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2007 Supp. 44-501(a).

> injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]
>
> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.[5]

Respondent argues that claimant's injury occurred while claimant was walking home from the walk-in freezer. Respondent contends the "going and coming" rule of K.S.A. 2007 Supp. 44-508 applies to this situation. However, respondent failed to raise that issue to the ALJ at the preliminary hearing and failed to argue that issue in its brief to the ALJ. The first time this issue is raised is to the Board.

The Board is limited under K.S.A. 2008 Supp. 44-551 to reviewing issues presented to and decided by an administrative law judge.

The Board cannot review matters unless and until they are presented to and decided by an ALJ. That is not the case with this issue. Therefore, respondent's appeal of this issue is dismissed.

> It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.[6]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or

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[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[5] K.S.A. 2007 Supp. 44-508(f).

[6] K.S.A. 2007 Supp. 44-501(g).

intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[7]

Here, claimant has displayed a significant preexisting condition in his low back and right leg. However, claimant underwent epidural injections in November and December 2007 and experienced significant relief from those injections. The report of Dr. Schmidt on December 28, 2007, indicates little back pain. Claimant testified to receiving almost instant relief from the injections. It was only after the slip incident of January 3, 2008, that claimant was forced to seek additional treatment. The January 4, 2008, report of Dr. Schmidt noted significant increased pain in claimant's low back and right leg.

This Board Member acknowledges the circumstances leading up to this injury, including claimant's acquiring of workers compensation insurance only days before the injury, raise a concern. However, claimant's testimony that the agent for the insurance company was the one instigating the inquiry about whether claimant wanted to obtain workers compensation insurance for himself is uncontradicted.

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.[8]

This Board Member finds that claimant did suffer an aggravation of his low back and right leg symptoms when he slipped on the ice on January 3, 2008. Therefore, the award of benefits by the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven by a preponderance of the credible evidence that the incident on January 3, 2008, aggravated his preexisting low back and right leg conditions and medical treatment for those injuries is appropriate. The Order of the ALJ is affirmed on

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[7] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[8] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

[9] K.S.A. 44-534a.

that issue. Respondent's attempt to raise a new and previously unraised issue to the Board is dismissed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Medical Treatment of Administrative Law Judge Pamela J. Fuller dated November 4, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February, 2009.

HONORABLE GARY M. KORTE

c: Scott J. Mann, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge